

THIS DECISION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

Mailed: 9/7/04

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Jim Douglas and David Watson

Serial No. 76494125

Donald C. Casey for applicants.

Laura Gorman Kovalsky, Trademark Examining Attorney, Law
Office 110 (Chris A.F. Pedersen, Managing Attorney).

Before Quinn, Bottorff and Holtzman, Administrative
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by joint applicants Jim
Douglas and David Watson to register the mark THE BEARDED
CLAM for "restaurant services."¹

The trademark examining attorney refused registration
under Section 2(a) on the ground that the mark sought to be
registered consists of or comprises immoral or scandalous
matter.

¹ Application Serial No. 76494125, filed March 3, 2003, based on
an allegation of an intention to use the mark in commerce.

When the refusal was made final, applicants appealed. Applicants and the examining attorney filed briefs. An oral hearing was not requested.

The examining attorney maintains that the term "bearded clam" is vulgar in that it is a slang term for a woman's genitalia. In support of the refusal, the examining attorney submitted listings from slang dictionaries; two excerpts from articles retrieved from the NEXIS database; six excerpts from web sites taken from the Internet; and a summary of a GOOGLE search of the term "bearded clam" on the Internet.

Applicants argue, in urging that the refusal be reversed, that while the term "bearded clam" has a vulgar meaning, it also has a non-vulgar meaning in that clams do, in fact, have beards. In support of their position, applicants submitted exhibits A-I, all excerpts retrieved from the Internet, to show that one music band and at least three other restaurants use the term "Bearded Clam" to identify the restaurants; and to show that clams have an anatomical feature called a "beard." Further, applicants contend that the examining attorney has failed to cite to a standard dictionary listing of the term "bearded clam," and that the examining attorney's evidence otherwise is insufficient to show that a substantial composite of the

general public would regard the term as scandalous. In response to applicants' evidence, the examining attorney claims that it falls short in showing that a substantial composite of the general public views the term as non-vulgar.

Registration of a mark which consists of or comprises immoral or scandalous matter is prohibited under Section 2(a) of the Trademark Act. Our primary reviewing court, the U.S. Court of Appeals for the Federal Circuit, has stated the following:

To justify refusing to register a trademark under the first clause of section 1052(a), the PTO must show that the mark consists of or comprises "immoral, deceptive, or scandalous matter." *In re Mavety Media Group, Ltd.*, 33 F.3d 1367, 1371 (Fed. Cir. 1994). A showing that a mark is vulgar is sufficient to establish that it "consists of or comprises immoral...or scandalous matter" within the meaning of section 1052(a). See *id.* at 1373-74 (analyzing a mark in terms of "vulgarity"); *In re McGinley*, 660 F.2d 481, 485 (CCPA 1981) (quoting with approval *In re Runsdorf*, 171 USPQ 443, 443-44 (TTAB 1971), which refused registration of a mark on grounds of vulgarity). In meeting its burden, the PTO must consider the mark in the context of the marketplace as applied to the goods described in the application for registration. *McGinley*, 660 F.2d at 485. In addition, whether the mark consists of or comprises scandalous matter must be determined from the standpoint of a

substantial composite of the general public (although not necessarily a majority), and in the context of contemporary attitudes, *id.*, keeping in mind changes in social mores and sensitivities, *Mavety*, 33 F.3d at 1371.

In re Boulevard Entertainment, Inc., 334 F.3d 1336, 67 USPQ2d 1475, 1477 (Fed. Cir. 2003).

Although we summarized the evidence of record above, we now give closer scrutiny to the record in our determination of the merits of the refusal.

The examining attorney introduced the following relevant dictionary listings of "bearded clam":

a woman's genital area
(*The Winthrop Slang Dictionary*, 2001)
(available at www.winthrop.edu)

slang term for the vagina; woman's genitalia
(www.urbandictionary.com)

In addition to the above listings, we take judicial notice of the following definitions:²

the female genitalia
(*Slang* (1998))

the female genitals; the vulva; the "beard" is the pubic hair
(*Slang and Euphemism* (rev. ed. 2001))

² Dictionary definitions are proper subject matter for judicial notice. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

the vagina; one of several terms
linking the organ to fish (also listing
"bearded oyster")
(*The Cassell Dictionary of Slang*
(1998))

the vulva
(*Dictionary of American Slang* (3d ed.
1995)

the vagina
(*The Big Book of Filth*) (1999))

With respect to this portion of the record, it should be noted that the examining attorney submitted two additional dictionary definitions, taken from foreign dictionaries, which have not been considered.³ Such listings in dictionaries of foreign origin are not competent to show the significance of the term "bearded clam" to a substantial composite of the general American public. In re Wilcher Corp., 40 USPQ2d 1929 (TTAB 1996).

The examining attorney also made of record excerpts of two articles retrieved from the NEXIS database:

PUSSIES OF THE WORLD, UNITE!
Consider the vagina. And--Lord knows--
who amongst us hasn't? Whatever you
call it--pussy, snatch, twat, cunt,
cooch, pinoche, poonanni, beaver, bunny
hole, fur patch, the slobbery puppy,
camel toe, spicy taco, sushi bar,

³ The *American-Australian Slang Dictionary* and the *Australian Slang Dictionary* contain definitions that are identical to the ones above. Inasmuch as we are not considering the foreign dictionary evidence, the examining attorney's request to take judicial notice of the definition of "crass," which term is used in one of the foreign dictionaries to describe the meaning of "bearded clam," is moot.

baby's first water slide, the ooze palace, beef curtains, the bearded clam, the eye of God, bloody hatchet wound, Mommy, the source of and cure for all man's problems--the reality is that it's a pretty powerful piece of human anatomy.
(*OC Weekly*, February 8, 2002)

Eventually the two teens' budding polymorphous sexuality will be punished....Subconsciously, perhaps, Araki is condemning the couple for their breeder status; Amy is constantly compared to a fish, or a "big, wet bearded clam," and gets her comeuppance via gang rape. Let's just say she fares better than Jordan.
(*SF Weekly*, October 25, 1995)

Also introduced were several excerpts of web pages taken from the Internet; all but one appear to be from pornographic web sites. One page includes a photograph of a naked woman on her back in a prone position exposing her genitalia under the headline: "Here's another great shot of a nice bearded clam!" (www.thefleshfactory.com). Another site touts that its photographs are "a cunnilinary delight, sweet wet bearded clam served...." (www.nastyfetish.com). Another site, which provides links to photos featuring female genitalia, calls itself "The Bearded Clam A colossal collection of cunts!" (www.premium-sex-links.com). Another site, not pornographic in nature, sells a variety of items, including t-shirts described by the merchant as "vulgar," bearing a

representation of what the merchant calls "bearded clam." The site, www.vulgariTees.com, indicates that the merchant sells "clothing for vulgar people."

The examining attorney also submitted a partial printout of a GOOGLE search report generated by a search of "'bearded clam' & (porn or pictures or photos or pussy)." The report runs for 75 pages; the first 10 pages and the last page were submitted as representative of the entire report. The summaries of these undoubtedly pornographic web sites show repeated use of "bearded clam" as a vulgar term (among many others) for female genitalia.

Although applicants have not disputed that the term has a vulgar meaning, applicants have countered with their own evidence in an effort to show that the term "bearded clam" has a non-vulgar meaning as well. The first exhibit shows an advertisement for a concert on August 2, 1968 featuring a band named "Bearded Clam." (Exhibit A). Applicants' evidence also includes evidence of three apparently unrelated restaurants that operate under the name "Bearded Clam." (Exhibits B-D). Another document is from the Internet and shows use of "Bearded clam" in connection with electronic gaming. (Exhibit E). A recipe retrieved from the Internet includes the instruction: "Steam open the well-washed clams, beard them; save the

broth." (Exhibit F). Applicants also submitted a one-page printout of a GOOGLE search report of the term "clam beards." (Exhibit G). The report summarizes 10 web sites, of which only 3 are pertinent⁴: "...Commandments in which Moses says 'this golden gown was spun from the beards of shellfish....'; "Hand tools are the only permitted devices for clam harvesting....rocks, wharf-pilings or other salt-water-submerged surfaces by means of fine threads or 'beards.'"; and "Steamed Mussels Wash and scrub the shells and scrape off their beards." Also of record is an excerpt retrieved from the Internet captioned "Invertebrate Zoology Lecture Outlines." (Exhibit H). The excerpt indicates that clams have byssal fibers (which applicants attempt to equate to "beards"). Lastly, applicants submitted another search report using the GOOGLE web site, this time of the term "clam byssus." (Exhibit I). The gist of these summarized Internet sites is that a clam has a byssus, which is a mucous-like thread allowing the clam to attach itself to a stationary object like a rock or boating dock.

Starting with the dictionary listings of the term "bearded clam," it is clear that the term is slang for a

⁴ The other sites are clearly irrelevant to the issue herein (e.g., "Black Beards Clam Bar" and "story-book illustrations almost always picture Old Testament Patriarchs and Prophets with full beards....Even if I picture him using a clam shell or a flint knife....")

woman's genitalia. As the Federal Circuit has stated, "dictionary definitions represent an effort to distill the collective understanding of the community with respect to language and thus clearly constitute more than a reflection of the individual views of either the examining attorney or the dictionary editors." In re Boulevard Entertainment, supra at 1478.

The dictionary evidence uniformly characterizes the term "bearded clam" as a slang reference to a woman's genitalia or a woman's vagina. There are no non-vulgar dictionary definitions for the specific term "bearded clam" in this record, and it is clear that the mark used by applicants is a slang term to refer to a woman's genitalia. In a case in which the evidence shows that the mark has only one pertinent meaning, dictionary evidence alone can be sufficient to satisfy the PTO's burden. Id. In the present case, however, applicants contend that the term "bearded clam" also has a non-vulgar meaning, namely because clams have beards.

In reviewing applicants' evidence, we recognize that there is evidence, albeit extremely limited, to suggest that clams have "beards." But the evidence of use of the term "beard" to describe mucous-like threads that are used by a clam to attach itself to rocks or other objects is

very sparse, and obviously does not show use of the specific term "bearded clam" in ordinary discourse. Most of the articles referring to this anatomy of a clam use the scientific name "byssus" or "byssal fiber." We daresay that this zoological fact, that is, that clams have a byssus (or, in applicants' view, a "beard"), is so obscure that a substantial composite of the general public will not even know this. That is to say, we are not convinced that the articles relied upon by applicants are of a nature to show that they have been exposed to a large segment of the American public. Moreover, the mark sought to be registered in this case is "bearded clam," not "clam beards" (which was the term searched by applicants).

Even assuming, *arguendo*, applicants are correct that the term "bearded clam" has a non-vulgar meaning in addition to its vulgar one, we find that the additional evidence of record submitted by the examining attorney uniformly indicates that the term "bearded clam," as understood by a substantial composite of the general public, is primarily a vulgar reference to female genitalia. Simply put, applicants' evidence falls far short in overcoming the prima facie case established by the examining attorney. Rather, to the extent that there is any non-vulgar zoological meaning of the term, this meaning

is completely overwhelmed by the vulgar meaning. In re Boulevard Entertainment, Inc., supra; and In re Wilcher Corp., supra.

In this way, the present case stands in sharp contrast to the situation found in Mavety wherein the Court found that the term "tail," in the context of the use of BLACK TAIL as applicant's mark for magazines, had both a vulgar and an equally applicable non-vulgar meaning. In the case before us, not only are all of the possible meanings of "bearded clam" vulgar, but there is ample evidence to support this meaning, and that the term would be scandalous to a substantial composite of the general population.

Likewise, the present case is distinguishable from the case of In re Hershey, 6 USPQ2d 1470 (TTAB 1988) wherein the Board found that BIG PECKER BRAND for t-shirts was not scandalous. In that case, the Board looked to the specimens of actual use showing a bird design. The Board found that the design, although not part of the mark, served to buttress the applicants' contention that the mark was not intended to refer to male genitalia but, rather, referred to the more common meaning of a bird's beak. The Board indicated that the inclusion of the bird design would make it less likely that purchasers would attribute any vulgar connotation to the word mark. In the present case,

there is no accompanying design that might possibly serve to impart a non-vulgar meaning to the term "bearded clam." In any event, unlike the prior situation dealing with the public's knowledge of the more common meaning of a bird's beak, the knowledge that a clam has a beard is far from common among the general public.

The fact that there are three other restaurants and a band which have used "Bearded Clam" as a service mark says nothing about whether the public would regard the term as vulgar. Indeed, these users may very well have been attracted to the term because of the scandalous nature of it, for "shock" value, and this does certainly not mean that "bearded clam" is not scandalous to a substantial composite of the general public.

Decision: The refusal to register is affirmed.